Tun Dr Mahathir bin Mohamad v Datuk Seri Mohd Najib bin Tun Hj Abdul Razak & Ors

HIGH COURT (KUALA LUMPUR) — APPLICATION FOR JUDICIAL REVIEW NOS WA-25–206–08 OF 2017 AND WA-25–250–09 OF 2017
AZIZAH NAWAWI J
14 FEBRUARY 2018

Administrative Law — Judicial review — Application for leave — Whether subject matter amenable to judicial review — Whether application of judicial review frivolous — Rules of Court 2012 O 53 r 3 — Specific Relief Act 1950 s 44

Constitutional Law — Judiciary — Appointment — Whether applicant had legal right to direct Prime Minister to tender advice to Yang di-Pertuan Agong — Federal Constitution arts 40, 122(1A) & 122B

This was an application by the applicant seeking leave to commence judicial review proceedings under O 53 r 3 of the Rules of Court 2012 ('the ROC'). In respect of WA-25–206–08 of 2017 ('the first application'), the third respondent, Tan Sri Dato' Seri Md Raus bin Sharif was appointed as an additional judge of the Federal Court by the Yang di-Pertuan Agong ('the YDPA') on the advice of the then serving Chief Justice, Tun Ariffin bin Zakaria pursuant to art 122(1A) of the Federal Constitution ('the Constitution'). The period of appointment was for three years commencing from 4 August 2017, after the third respondent had reached the age of 66 years and six months. The third respondent was appointed to continue as the Chief Justice ('the CJ') pursuant to art 122B(1) of the Constitution by the YDPA on the advice of the Prime Minister, the first respondent, after consulting the Conference of Rulers on 25 May 2017. On 4 August 2017, the third respondent received his letter of appointment and took the oath of office as the CJ of the Federal Court before the YDPA at the Istana Negara. In respect of WA-25–250–09 of 2017 ('the second application'), the third respondent, Tan Sri Dato' Seri Zulkefli bin Ahmad Makinudin was appointed as an additional judge of the Federal Court by the YDPA on the advice of the then serving Chief Justice, Tun Ariffin bin Zakaria pursuant to art 122(1A) of the Constitution. The period of appointment was for two years commencing from 28 September 2017, after the third respondent had reached the age of 66 years and six months. The third respondent was appointed to continue as the President of the Court of Appeal ('the PCA') pursuant to art 122B(1) of the Constitution by the YDPA on the advice of the Prime Minister, the first respondent, after consulting the Conference of Rulers on 25 May 2017. On 23 September 2017, the third respondent received his letter of appointment and took the oath of office as the

PCA before the YDPA at the Istana Negara. Based on the said applications, the applicant was seeking leave to commence judicial review proceedings for: (a) an order of mandamus to compel the first and second respondents to render advice to the YDPA pursuant to art 40(1) and 40(1A) of the Constitution, for the purposes of revoking and/or terminating the YDPA consent granted on 25 May 2017 with regards to the appointment of the third respondents in the first and second applications as additional judges of the Federal Court, and for the third respondent in the first application to continue holding the position as the CJ from 4 August 2017, for a further period of three years; and for the third respondent in the second application to continue holding the position as the PCA from 28 August 2017, for a further period of two years; and (b) an order for stay pursuant to O 53(4) and (5) of the ROC to stay the third respondents in the first and second applications from carrying out all or any duties in whatsoever manner as the CJ and the PCA until further orders of this court.

Held, dismissing the applications for leave with no order as to costs

(1) Any application for an order of mandamus made by way of judicial review proceedings must comply with the requirement of s 44 of the Specific Relief Act 1950 ('the SRA'). The second respondent, Kerajaan Malaysia was not a relevant party as the second respondent was not an entity referred to in art 122B(1) read with art 40(1A) of the Constitution. Thus an order of mandamus could not be issued against the second respondent either under s 44 of the SRA or para 1 of the Schedule (see paras 26–27 & 35).

(2) In seeking a mandamus to direct the Prime Minister to advice the YDPA under art 40(1) and (1A) of the Constitution to revoke and/or terminate the YDPA's assent to the appointment as an additional judge and to the office of CJ and PCA respectively, the order sought by the applicant was frivolous and/or there was no arguable case shown to obtain the order of mandamus at the substantive stage. This was because, the applicant had no clear and specific legal right to the relief sought; and there was no statutory duty imposed by law on the second respondent (see para 36).

(3) Under arts 122B(1) and 40(1A) of the Constitution, there was nothing that gives the legal right to the applicant to direct the Prime Minister to tender the advice to the YDPA. There was simply no statutory duty imposed on the Prime Minister to act on the applicant's application to advice the YDPA. There was also no issue that the Prime Minister had failed to perform a statutory duty (see paras 38–39 & 43).

[Bahasa Malaysia summary

Ini adalah permohonan oleh pemohon untuk mendapatkan kebenaran daripada mahkamah untuk memulakan prosiding semakan kehakiman di bawah K 53 A 3 Kaedah-Kaedah Mahkamah 2012 ('KKM'). Dalam perkara

WA-25–206–08 Tahun 2017 ('permohonan pertama'), responden ketiga, Tan Sri Dato' Seri Md Raus bin Sharif telah dilantik sebagai hakim tambahan Mahkamah Persekutuan oleh Yang di-Pertuan Agong ('YDPA') atas nasihat oleh Ketua Hakim Negara pada ketika itu, Tun Ariffin bin Zakaria di bawah perkara 122(1A) Perlembagaan Persekutuan ('Perlembagaan'). Tempoh lantikan adalah untuk jangka masa tiga tahun bermula 4 Ogos 2017 iaitu selepas responden ketiga telah mencapai usia 66 tahun dan enam bulan. Responden ketiga telah dilantik untuk terus memegang jawatan sebagai Ketua Hakim Negara ('KHN') di bawah perkara 122B(1) Perlembagaan oleh YDPA atas nasihat Perdana Menteri, responden pertama, selepas berunding dengan Majlis Raja-Raja pada 25 Mei 2017. Pada 4 Ogos 2017, responden ketiga telah menerima surat lantikan and telah mengangkat sumpah sebagai KHN di hadapan YDPA di Istana Negara. Dalam perkara WA-25–25–09 Tahun 2017 ('permohonan kedua'), responden ketiga, Tan Sri Dato' Seri Zulkefli bin Ahmad Makinudin telah dilantik sebagai hakim tambahan Mahkamah Persekutuan oleh YDPA atas nasihat Ketua Hakim Negara pada ketika itu, Tun Ariffin bin Zakaria di bawah perkara 122(1A) Perlembagaan. Tempoh lantikan adalah untuk tempoh masa selama dua tahun bermula 28 September 2017, iaitu selepas responden ketiga telah mencapai usia 66 tahun dan enam bulan. Responden ketiga telah dilantik untuk terus memegang jawatan sebagai Presiden Mahkamah Rayuan ('PMR') di bawah perkara 122B(1) Perlembagaan oleh YDPA atas nasihat Perdana Menteri, selepas berunding dengan Majlis Raja-Raja pada 25 Mei 2017. Pada 23 September 2017, responden ketiga telah menerima surat lantikan and telah mengangkat sumpah sebagai PMR di hadapan YDPA di Istana Negara. Berdasarkan kedua-dua permohonan ini, pemohon telah memohon pada mahkamah untuk mendapatkan kebenaran untuk memulakan prosiding semakan kehakiman untuk: (a) satu perintah untuk mengarahkan responden pertama dan responden kedua untuk menasihati YDPA di bawah perkara 40(1) dan 40(1A) Perlembagaan, dengan tujuan untuk membatalkan dan/atau menamatkan perkenan YDPA pada 25 Mei 2017 berkenaan dengan perlantikan responden ketiga dalam permohonan pertama dan permohonan kedua sebagai hakim tambahan Mahkamah Persekutuan dan bagi responden ketiga dalam permohonan pertama daripada terus memegang jawatan sebagai KHN dari 4 Ogos 2017 untuk tempoh lanjutan selama tiga tahun; dan untuk responden ketiga dalam permohonan kedua daripada terus memegang jawatan sebagai PMR dari 28 Ogos 2017, untuk tempoh lanjutan selama dua tahun; dan (b) satu perintah pergantungan di bawah k 53(4) dan (5) KKM bagi menggantung responden ketiga dalam permohonan pertama dan permohonan kedua daripada menjalankan apa-apa tugas dalam apa cara sekalipun sebagai KHN dan PMR sehingga adanya perintah daripada mahakamah ini.

Diputuskan, menolak permohonan untuk kebenaran tanpa perintah untuk kos:

(1) Apa-apa permohonan untuk perintah mandamus melalui prosiding semakan kehakiman hendaklah memenuhi keperluan dalam s 44 Akta Relief Spesifik 1950 ('ARS'). Responden kedua, kerajaan Malaysia bukanlah pihak yang relevan disebabkan responden kedua bukannya merujuk pada entiti yang termaktub dalam perkara 122B(1) dibaca bersama perkara 40(1A) Perlembagaan. Oleh itu, perintah mandamus tidak boleh dikenakan kepada responden kedua sama ada di bawah s 44 ARS atau perenggan 1 dalam Jadual (lihat perenggan 26–27 & 35).

(2) Dalam mendapatkan perintah mandamus untuk mengarahkan Perdana Menteri menasihati YDPA di bawah perkara 40(1) dan 40(1A) Perlembagaan untuk membatalkan perkenan YDPA dalam perlantikan sebagai hakim tambahan dan juga KHN dan PMR, perintah tersebut adalah tidak berasas dan tidak terdapat kes yang boleh disangkal untuk membenarkan perintah tersebut diberikan dalam peringkat substantif. Hal ini disebabkan pemohon dengan jelas tidak mempunyai hak dari segi perundangan untuk mendapatkan relif dan tiada mana-mana tugasan tertulis termaktub oleh undang-undang pada responden kedua (lihat perenggan 36).

(3) Dalam perkara 122B(1) dan 40(1A) Perlembagaan, tiada apa-apa hak di sisi undang-undang untuk pemohon mengarahkan Perdana Menteri untuk menasihati YDPA. Adalah tidak menjadi satu tugasan tertulis dikenakan pada Perdana Menteri untuk bertindak atas permohonan yang dibuat oleh pemohon untuk menasihati YDPA. Tiada isu Perdana Menteri gagal menjalankan tugasan tertulis (lihat perenggan 38–39 & 43).]

Notes

For a case on appointment, see 3(2) *Mallal's Digest* (5th Ed, 2015) para 2959.
For cases on judicial review in general, see 1(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 318–518.

Cases referred to

C v Comptroller of Income Tax [1967] 2 MLJ 137, FC (refd)
Glen Waverley Sdn Bhd v Pengarah Tanah dan Galian, Negeri Selangor & Anor [2001] 4 MLJ 122, HC (refd)
Koon Hoi Chow v Pretam Singh [1972] 1 MLJ 180b (refd)
Malaysian Bar v Tan Sri Dato Abdul Hamid bin Omar (No 2) [1989] 2 MLJ 283, SC (refd)
Menteri Besar Negeri Pahang Darul Makmur v Seruan Gemilang Makmur Sdn Bhd [2010] 4 MLJ 360; [2010] 5 CLJ 123, CA (refd)
Minister of Finance, Government of Sabah v Petrojasa Sdn Bhd [2008] 4 MLJ 641; [2008] 5 CLJ 321, FC (refd)
Mohamed Ezam bin Mohd Nor & Ors v Ketua Polis Negara [2002] 1 MLJ 321; [2001] 4 CLJ 701, FC (refd)

Reg v Gough [1993] AC 646, HL (refd)
Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat and another case [2017] 3 MLJ 561, FC (refd)
Teh Guat Hong v Perbadanan Tabung Pendidikan Tinggi Nasional [2015] MLJU 213; [2015] 3 AMR 35, CA (refd)
WRP Asia Pacific Sdn Bhd v Tenaga Nasional Bhd [2012] 4 MLJ 296; [2012] 4 CLJ 478, FC (refd)
Workon Sdn Bhd v The Director of Lands & Surveys, Sabah [1999] 4 MLJ 177, HC (refd)

Legislation referred to

Courts of Judicature Act 1964 Schedule, para 1
Federal Constitution arts 4(1A), 40(1), 40(1A), 122, 122(1A), 122A, 122B(1), 125, 125(1)
Government Proceedings Act 1956 s 33(1)
Income Tax Ordinance (Cap 166) s 93(3)
Rules of Court 2012 O 53, O 53 rr 1, 1(1), 1(2), 2, 2(2), 3, 3(4), 3(5)
Specific Relief Act 1950 s 44, Part 2, Chapter VIII

Hanif Khatri (Ilyani Khuszairy with him) (Haniff Khatri) for the applicant.
Alice Loke (Natra Idris with her) (Senior Federal Counsel, Attorney General's Chambers) for the respondents.

Azizah Nawawi J:

APPLICATIONS

[1] In WA-25–206–08 of 2017, the applicant is seeking leave to commence judicial review proceedings under O 53 r 3 of the Rules of Court 2012 ('the ROC 2012') for the following prayers:

(a) an order of mandamus to compel the first and second respondents to render advice to His Majesty Yang di-Pertuan Agong ('YDPA'), pursuant to art 40(1) and (1A) of the Federal Constitution, for the purposes of revoking and/or terminating YDPA consent granted on 25 May 2017 with regards to the appointment of the third respondent as an additional judge of the Federal Court, and to continue holding the position as the Chief Justice of the Federal Court from 4 August 2017, for a further period of three years; and

(b) an order for stay pursuant to O 53 r 3(4) and 3(5) of the Rules of Court 2012 to stay the third respondent from carrying out all or any duties in whatsoever manner as the Chief Justice of the Federal Court until further orders of this court.

[2] In WA-25–250–09 of 2017, the applicant is seeking leave to commence

judicial review proceedings under O 53 r 3 of the ROC 2012 for the following prayers:

(a) an order of mandamus to compel the first and second respondents to render advice to the YDPA, pursuant to art 40(1) and (1A) of the Federal Constitution, for the purposes of revoking and/or terminating YDPA consent granted on 25 May 2017 with regards to the appointment of the third respondent as an additional judge of the Federal Court, and to continue holding the position as the President of the Court of Appeal from 28 August 2017, for a further period of two years; and

(b) an order for stay pursuant to O 53 r 3(4) and 3(5) of the ROC 2012 to stay the third respondent from carrying out all or any duties in whatsoever manner as the President of the Court of Appeal until further orders of this court.

[3] The grounds, common to both applications, are as follows:

(a) art 125(1) of the Federal Constitution does not allow the appointment of a person who has attained the age of 66 years and six months to hold the post of the Chief Justice of the Federal Court and the President of the Court of Appeal respectively;

(b) art 122(1A) does not allow the Chief Justice of the Federal Court to advice the YDPA to appoint a serving judge (who has not retired) as an additional judge after the judge retires;

(c) art 122(1A) does not allow a retiring Chief Justice of the Federal Court to tender advice to the YDPA for the appointment of additional judges; and

(d) art 122 does not allow an additional judge to hold the post of Chief Justice of the Federal Court and the President of the Court of Appeal respectively,

THE SALIENT FACTS

[4] The applicant was the Prime Minister of Malaysia from 1981–2003.

[5] In respect of WA-25–206–08 of 2017, the facts are as follows:

(a) the third respondent was appointed as an additional judge of the Federal Court by the YDPA on the advice of the then serving Chief Justice (Tun Ariffin bin Zakaria) pursuant to art 122(1A) of the Federal Constitution;

(b) the period of appointment is for three years commencing from 4 August 2017, after the third respondent has reached the age of 66 years and six months;

(c) the third respondent was appointed to continue as the Chief Justice pursuant to art 122B(1) by the YDPA on the advice of the Prime Minister, the first respondent, after consulting the Conference of Rulers on 25 May 2017; and

(d) on 4 August 2017, the third respondent received his letter of appointment and took the oath of office as the Chief Justice of the Federal Court before the YDPA at the Istana Negara.

[6] In respect of WA-25–250–09 of 2017, the facts are as follows:

(a) the third respondent was appointed as an additional judge of the Federal Court by the YDPA on the advice of the then serving Chief Justice (Tun Ariffin bin Zakaria) pursuant to art 122(1A) of the Federal Constitution;

(b) the period of appointment is for two years commencing from 28 September 2017, after the third respondent has reached the age of 66 years and six months;

(c) the third respondent was appointed to continue as the President of Court of Appeal pursuant to art 122B(1) by the YDPA on the advice of the Prime Minister, the first respondent, after consulting the Conference of Rulers on 25 May 2017; and

(d) on 23 September 2017, the third respondent received his letter of appointment and took the oath of office as the President of the Court of Appeal before the YDPA at the Istana Negara.

THE FINDINGS OF THE COURT

[7] Before the hearing of this application for leave, the applicant made an oral application for my recusal from hearing this case on the basis that I have decided on the issue of mandamus in an application for judicial review in WA-25–207–08 of 2017, involving the same applicant against members of the Royal Commission established by the YDPA to enquire into the 'Kerugian Akibat Urus Niaga Mata Wang Asing Oleh Bank Negara Malaysia Sekitar Tahun 1990-an' ('the RCI case').

[8] Learned counsel for the applicant submitted that since I have decided on the issue of mandamus in the RCI case, then I will definitely apply the same principles in this case. Hence the applicant applies for my recusal and that this case be transferred to another judge.

[9] The Federal Court in *Mohamed Ezam bin Mohd Nor & Ors v Ketua Polis Negara* [2002] 1 MLJ 321; [2001] 4 CLJ 701 has held that the test on bias is whether there is a real danger of bias. Suspicion or even reasonable suspicion is

not enough. At p 706, Mohamed Dzaiddin CJ said:

> In our view, on the facts submitted by counsel and the reasons given by the learned trial judge in the grounds of judgment at p 601 of the appeal record, there is no likelihood of danger, in the sense of a real possibility, of bias on the part of the learned judge when he heard the habeas corpus application. We concede that the only common factor between the appellants and the 'Black 14' judgment of the learned judge is that the appellants were detained by the respondent for organizing demonstrations one of which was on 14 April 2001 which became the foundation for the 'Black 14' allegation of the respondent. However, we do not think such circumstances do give rise to a *real danger of bias* on the part of the learned judge. (Emphasis added.)

[10] The Federal Court in *Mohamed Ezam*'s case has applied the English position in *Reg v Gough* [1993] AC 646. The test, formulated by Lord Goff at p 670 is as follows:

> Having ascertained the relevant circumstances, the court should ask itself whether, having regard to those circumstances, *there was a real danger of bias* on the part of the relevant member of the tribunal in question, in the sense that he might unfairly regard (or have unfairly regarded) with favour, or disfavour, the case of a party to the issue under consideration. (Emphasis added.)

[11] Therefore, the applicant must show that there is a real danger of bias, and not just a reasonable suspicion of bias on the part of this court to hear this application. In the present application, the 'real danger of bias' has not been made out as this application for recusal is only premised on judicial opinion on the issue of mandamus.

[12] Similar issue was taken up in the case of *Malaysian Bar v Tan Sri Dato Abdul Hamid bin Omar (No 2)* [1989] 2 MLJ 283, where Hashim Yeop Sani CJ (Malaya) said at p 284:

> Firstly, on the question of disqualification. As regards the three of us here *the only objection would seem to be that we sat on 21 and 22 July 1988 to consider the order of prohibition issued against the tribunal.* The Supreme Court which sat on the two days mentioned was only concerned with the legality or propriety of the order of prohibition. *We were only concerned with questions of law* and not concerned with the circumstances which brought about the committal proceedings.
>
> ... In conclusion *we do not consider that we should disqualify ourselves on the ground of bias or likelihood of bias because there is absolutely no reason to do so*. (Emphasis added.)

[13] With regards to the application for leave, the applicant outlines the relevant constitutional provisions to be as follows:

(a) that art 125(1) of the Federal Constitution does not allow the appointment of a person having already attained the mandatory age of 66 years and six months to hold the position of Chief Justice of the Federal Court/President of the Court of Appeal;

(b) that art 122(1A) does not allow an advice for the appointment of an additional judge rendered to the YDPA, to be made before the proposed candidate (as the additional judge) had actually retired;

(c) that art 122(1A) does not allow the advice of the Chief Justice (Tun Ariffin Zakaria) rendered prior to his retirement, to the YDPA to remain valid (after Tun Ariffin's retirement) for the purpose of the appointment of additional judges of the Federal Court; and

(d) that art 122 does not allow any additional judge to hold the position of the Chief Justice of the Federal Court, the President of the Court of Appeal, the Chief Judge of Malaya and the Chief Judge of Sabah and Sarawak.

[14] As such, the applicant submits that the said appointments as the additional judges of the Federal Court, and the consequential appointments to the posts of the Chief Justice of the Federal Court and the President of the Court of Appeal respectively, are ultra vires the said provisions of the Federal Constitution. Therefore, in view of the constitutional importance of this case, the applicant submits that leave must be granted. The applicant relies on the case of *Teh Guat Hong v Perbadanan Tabung Pendidikan Tinggi Nasional* [2015] MLJU 213; [2015] 3 AMR 35, where Justice Hamid Sultan JCA held as follows:

> ... the courts have a constitutional duty to check all forms of executive decision by way of judicial review when it infringes on the right of the public or the Constitution, etc ... As per the Federal Constitution, the court is the 'supreme arbiter' of what is right or wrong at any given time.

[15] The applicant also relied on the decision of the Federal Court in *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat and another case* [2017] 3 MLJ 561, where Justice Zainun FCJ held as follows:

> [59] Judicial power is the power every sovereign state must of necessity have, to decide controversies between its subjects or between itself and its subjects, whether the rights related to life, liberty or property. The exercise of this power does not begin until some tribunal which has power to give an authoritative decision which is binding (whether subject to appeal or not) is called upon to take action (see *Dato' Seri Anwar bin Ibrahim v Public Prosecutor* [2011] 1 MLJ 158 at p 237; [2010] 7 CLJ 397 at p 485.
>
> ...
>
> [88] The Judiciary is thus entrusted with keeping every organ and institution of the

state within its legal boundary. Concomitantly the concept of independence of the Judiciary is the foundation of the principles of the separation of powers.

[16] Therefore, premised on the cases cited above, the applicant submits as follows:

4.8 Wherefore, we shall humbly submit that this Honourable Court shall carry out this fundamental principles of separation of powers enshrined within our sacred Federal Constitution to the fullest, by granting leave for this Applicant to proceed with this application for Judicial Review to the substantive stage, at the very least at this juncture.

[17] Bearing in mind that this is an application for leave to commence judicial review proceedings under O 53 of the ROC 2012, it is trite that the test for leave to commence with judicial review was held by the Federal Court in *WRP Asia Pacific Sdn Bhd v Tenaga Nasional Bhd* [2012] 4 MLJ 296; [2012] 4 CLJ 478, to be as follows:

Leave may be granted if the leave application is not thought of as frivolous, and if leave is granted, an arguable case of granting the reliefs sought at the substantive hearing may be the resultant outcome. A rider must be attached to the application though, ie, unless the matter for judicial review is amenable to judicial review no success may be envisaged.

[18] Despite the important constitutional issues raised in this application, the applicant will still have to comply with the test set out by the Federal Court in *WRP Asia Pacific Sdn Bhd*, that is:

(a) whether the subject matter is amenable to judicial review; and if so

(b) from the materials available, whether the application is frivolous and if not thought as frivolous, to consider that the applicant has an arguable case to obtain the relief sought at the substantive hearing.

[19] The learned senior federal counsel, Puan Alice Loke ('SFC') representing the Honourable Attorney General raised an objection to this application. Learned SFC submits that the order sought by the applicant is frivolous and/or that there is no arguable case shown to obtain the order of mandamus at the substantive stage.

[20] Having considered the application and the submission of the parties, I find that there is merit in the objection raised by the learned SFC.

[21] O 53 rr 1 and 2 of the ROC 2012, specifically provides the reliefs that can be applied in an application for judicial review. Order 53 r 1(1) reads:

This Order shall govern all applications seeking the relief specified in paragraph 1 of

A the Schedule to the Courts of Judicature Act 1964 and for the purposes therein specified.

B **[22]** The reliefs under para 1 of the Schedule include, inter alia, orders in the nature of certiorari, mandamus, prohibition, quo warranto. The relief of certiorari is to quash decisions while mandamus is a relief against an 'omission' and is subject to Chapter VIII of the Specific Relief Act 1950. Prohibition is a relief to check unlawful actions in the exercise of a public function whilst a quo warranto is used to challenge the appointment of a person to a public office in the case where he is not qualified to hold that office or his appointment suffers from any legal flaw.

C

D **[23]** Added to that, O 53 r 2(2) provides that an application for judicial review may include a prayer for a declaration, either jointly or in the alternative in the same application if it relates to or is connected with the same subject matter.

E **[24]** The applicant seeks leave to commence judicial review proceedings, for an order of *mandamus* to compel the first and the secondrespondent to advice the YDPA under art 40(1) and (1A) of the Federal Constitution to revoke the assent of the YDPA appointing the respective third respondent (in each application) as an additional judge of the Federal Court and to hold the offices of the Chief Justice of the Federal Court and the President of the Court of Appeal, respectively.

F

[25] The Federal Court in *Minister of Finance, Government of Sabah v Petrojasa Sdn Bhd* [2008] 4 MLJ 641 held that an order of mandamus can be granted either:

G (a) under s 44 of the Specific Relief Act 1950 ('the SRA'); or

(b) the additional powers of the High Court provided by para 1 of the Schedule to the Courts of Judicature Act 1964 ('the CJA').

H **[26]** It is also to be noted that O 53 r 1(2) of the ROC 2012 provides that this order (O 53) is subject to the of Chapter VIII of Part 2 of the SRA. Therefore, any application for an order of mandamus made by way of judicial review proceedings must comply with the requirement of s 44 of the SRA.

I **[27]** In Chapter VIII of Part 2 of the SRA, s 44 of the SRA reads as follows:

CHAPTER VIII

ENFORCEMENT OF PUBLIC DUTIES

44 Power to order public servants and others to do specific acts

(1) A Judge may make an order requiring any specific act to be done or forborne, by a person holding a public office, whether of a permanent or a temporary nature, or by any corporation or any court subordinate to the High Court:

Provided that —

(a) an application for such an order be made by some person whose property, franchise, or personal right would be injured by the forbearing or doing, as the case may be, of the said specific act;

(b) such doing or forbearing is, under any law for the time being in force, clearly incumbent on the person or court in his or its public character, or on the corporation in its corporate character;

(c) in the opinion of the Judge the doing and forbearing is consonant to right and justice;

(d) the applicant has no other specific and adequate remedy; and

(e) the remedy given by the order applied will be complete ...

[28] In *Koon Hoi Chow v Pretam Singh* [1972] 1 MLJ 180b, Sharma J held at p 182/A–D that there are four prerequisites essential to the issue of an order for mandamus:

(a) whether the applicant has a clear and specific legal right to the relief sought;

(b) whether there is a duty imposed by law on the respondent;

(c) whether such duty of an imperative ministerial character involving no judgment or discretion on part of the respondent; and

(d) whether the applicant has any remedy, other than by way of mandamus, for the enforcement of the right which has been denied to him.

[29] It is not in dispute that the appointment of both the third respondents in both applications was made by the YDPA, acting on the advice of the first respondent, the Prime Minister under art 122B(1) of the Federal Constitution. Therefore, pursuant to art 40(1A), the YDPA must act on the advice of the Prime Minister.

[30] The applicant's complaint here is that the advice tendered by the Prime Minister to the YDPA was unlawful as the same is ultra vires arts 122 and 122A, read with art 125 of the Federal Constitution. As such, the applicant has applied for a mandamus to compel the Prime Minister to advice the YDPA to revoke the appointments of the third respondent as an additional judge and as the Chief Justice of the Federal Court and the President of the Court of Appeal.

[31] It is common ground that under art 122B(1) of the Federal

Constitution, the YDPA will act on the advice of the Prime Minister:

> 122B(1) The Chief Justice of the Federal Court, the President of the Court of Appeal and the Chief Judges of the High Courts and (subject to Article 122C) the other judges of the Federal Court, of the Court of Appeal and the High Courts shall be appointed by the Yang di-Pertuan Agong, acting on behalf of the Prime Minister, after consulting the Conference of Rulers.

[32] The applicant also relies on arts 40(1) and 40(1A) of the Federal Constitution, which reads:

> 40 Yang di-Pertuan Agong to act on advice
>
> (1) In the exercise of his functions under this Constitution or federal law the Yang di-Pertuan Agong shall act in accordance with the advice of the Cabinet or of a Minister acting under the general authority of the Cabinet, except as otherwise provided by this Constitution; and shall be entitled, at his request, to any information concerning the government of the Federation which is available to the Cabinet.
>
> (1A) In the exercise of his functions under this Constitution or federal law, where the Yang di-Pertuan Agong is to act in accordance with the advice on advice, or shall considering advice, the Yang di-Pertuan Agong shall accept and act in accordance with the advice.

[33] The applicant relies on the decision of the Federal Court in *Minister of Finance, Government of Sabah v Petrojasa Sdn Bhd* [2008] 4 MLJ 641; [2008] 5 CLJ 321 for the principle that a mandamus can be issued against the Minister of Finance and the Government of Sabah to pay the judgment sum pursuant to an order of the court. The mandamus was issued against the Minister of Finance as he was in charge of the financial matters. At p 666 (MLJ); p 349 (CLJ), Ariffin Zakaria FCJ said this:

> The appellant in the present case, as the Minister in charge of financial matters for the State is naturally responsible for the payment of the judgment sum. An order of mandamus may, in the circumstances, be issued to enforce such a compliance by the appellant.

[34] The case of *Petrojasa* is an enforcement of a judgment of the court. In the present case however, the applicant is relying on art 40(1) and 40(1A) of the Federal Constitution, which provides that the YDPA will act on the advice of the Cabinet or a Minister. In the context of this application, pursuant to art 122B(1), the YDPA will be acting on the advice of the Prime Minister, after consulting the Conference of Rulers.

[35] Therefore, I agree with learned SFC that the second respondent (Kerajaan Malaysia) is not a relevant party as the second respondent is not an entity referred to in art 122B(1) read with art 40(1A). Thus an order of

mandamus cannot be issued against the second respondent either under s 44 of the SRA or Para 1 of the Schedule.

[36] As against the first respondent, the applicant is seeking a mandamus to direct the Prime Minister to advice the YDPA under art 40(1) and (1A) of the Federal Constitution to revoke and/or terminate the YDPA's assent to the appointment as an additional judge and to the office of CJ and PMR respectively. I am of the considered opinion and I agree with the learned SFC that the order sought by the applicant is frivolous and/or there is no arguable case shown to obtain the order of mandamus at the substantive stage. This is based on the following reasons:

(a) that the applicant has a no clear and specific legal right to the relief sought; and

(b) that there is no statutory duty imposed by law on the second respondent, the Prime Minister.

[37] There is nothing in art 40(1), 40(1A) or 122B(1) that gives a legal right to the applicant to the relief sought. In *Petrojasa*'s case, the applicant has the legal right for an order of mandamus seeking the state government to pay the amount certified in the certificate issued under s 33(1) of the Government Proceedings Act 1956. This legal right is acquired based on judgment of the court. In *C v Comptroller of Income Tax* [1967] 2 MLJ 137, the Federal Court held that mandamus will lie against the Controller if he is under a statutory obligation to perform a duty towards the taxpayer, where the taxpayer has a legal right to the excess tax paid by him. The Federal Court ordered a mandamus directing the controller to comply with s 93(3) of the Income Tax Ordinance (Cap 166) by causing repayments to be made to the taxpayer being income tax paid by the taxpayer in excess of the amount payable by him. In *Glen Waverley Sdn Bhd v Pengarah Tanah dan Galian, Negeri Selangor & Anor* [2001] 4 MLJ 122, the High Court held that mandamus is an order to compel the performance of legal duty imposed by the law where the applicant has a legal right to the land title. The court held at p 136:

> Mandamus
>
> The first respondent is, pursuant to the letter of alienation, under an obligation to issue individual titles to all the approved subdivided lots to the applicant. The applicant may compel the first respondent to do so by obtaining an order of mandamus under para 1 of the Schedule to the Courts of Judicature Act 1964 and O 53 of the Rules of Court 1980 or pursuant to s 44 of the Specific Relief Act 1950.

[38] Under art 122B(1), the Prime Minister is to give advice, after consulting with the Conference of Rulers. Under art 40(1A) of the YDPA shall act on the advice given. Therefore, under both these provisions, there is

A nothing that gives the legal right to the applicant to direct the Prime Minister to tender the advice to the YDPA.

[39] Added to that, there is simply no statutory duty imposed on the Prime Minister to act on the applicant's application to advice the YDPA in these provisions. As such, the issue here is whether there is any legal duty or obligation imposed on the Prime Minister and that there is a failure to perform the said legal or statutory duty.

[40] In *Menteri Besar Negeri Pahang Darul Makmur v Seruan Gemilang Makmur Sdn Bhd* [2010] 4 MLJ 360; [2010] 5 CLJ 123, the Court of Appeal held at p 376 (MLJ); p 142 (CLJ):

> [38] In *MP Jain's Administrative Law in Malaysia and Singapore*, second edn, 1980, the learned author said, at pp 449 and 450:
>
> > ... Mandamus can be granted only when a legal duty is imposed on an authority and the applicant has a legal right to compel the performance of the public duty prescribed by law, and to keep the subordinate bodies and officers exercising public functions within the limit of their jurisdiction. Mandamus is thus a very wide remedy which is available against a public officer to see that he does his duty.
> >
> > *What can be enforced through mandamus is a duty of a public nature the performance of which is imperative and not optional or discretionary with the authority concerned. Thus, if an officer has a power rather than a duty, and he does not use his power, mandamus cannot be issued.* (Emphasis added.)

[41] The same position was taken by Justice Richard Malanjum (as His Lordship then was) in the case of *Workon Sdn Bhd v The Director of Lands & Surveys, Sabah* [1999] 4 MLJ 177 where His Lordship held that where a statute imposes a duty, the performance or non-performance of which is not a matter of discretion, mandamus may be issued. But if an officer has power and not duty under the law, and if he does not use his powers, mandamus is not issued to compel him to exercise his power.

[42] In the case of *Petrojasa*, Arifin Zakaria CJ (Malaya) held:

> [72] On that premise I am of the view that once a certificate is issued under s 33(1) of the GPA and duly served on the state government to make the necessary payment, it is then obligatory on the state government to make the necessary payment. In other words, *s 33(3) of the GPA creates a statutory duty* on the part of the state government to pay the amount as certified.
>
> ...
>
> [81] From the above, *the position in law is that, there is a duty on the part of the government to pay the amount stated in the Certificate issued under s 33(3) of the GPA*

to the respondent. It is not a matter of discretion for the government whether to pay or not to pay. *As a statutory duty, it is of course binding on the state government.* And it is incumbent upon the court to give effect to such statutory duty and if necessary through the coercive force of the order of mandamus. (Emphasis added.)

[43] In the present case, I am of the considered opinion that there is no statutory duty imposed on the Prime Minister to act in the manner that the applicant has applied for. There is also no issue that the Prime Minister has failed to perform a statutory duty. I agree with learned SFC that the YDPA has performed his functions under art 4(1A) of the Federal Constitution, that is, the appointment has already been made except that the applicant is of the view that it was not made according to his interpretation of the provisions of the Federal Constitution.

[44] In the premise, I am of the considered opinion that there is no arguable case and that both applications for leave are dismissed with no order as to costs.

Applications dismissed with no order as to costs.

Reported by Mohd Kamarul Anwar